DIGEST OF RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

MORRIS & CO. *v.* ALVIS.

June 16, 1921.

[107 S. E. 664.]

1. Master and Servant (§ 217 (11)*)—Risk of Unguarded Elevator and Insufficient Lights Assumed by Employee Continuing Work.—Where the door to a freight elevator shaft had been broken off and it was the custom to keep the elevator, when not in use, as a substitute for the door, an employee who was fully apprised of the condition of the elevator and the custom and of the insufficiency of the lighting system when he began work and who continued to work without protest until he was injured by falling into the shaft while passing it at night, could not complain of the conditions.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 695.]

2. Master and Servant (§ 217 (10)*)—Risk Assumed by Servant Continuing Work with Knowledge of Danger.—Where a servant continues to work with knowledge of danger, he assumes the risk, whether it be one ordinarily incident to the business or not, and whether it be due or not to the master's want of reasonable care as an original proposition.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 696.]

3. Master and Servant (§ 185 (8)*)—Duty of Closing Elevator Shaft Held Not an Unassignable Duty.—Where the duty of closing an elevator shaft for the safety of employees using a floor by keeping the floor of the elevator, when not in use, flush with the floor of the room, was left to coemployees of one who fell into the shaft, the closing of the shaft by such method, though adopted because the door to shaft was broken, was not an unassignable duty.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 668.]

4. Master and Servant (§ 216 (5)*)—Risk of Fellow Servant's Negligent Closing of Elevator Shaft Assumed.—A servant passing an open elevator shaft, which it was the master's method to have closed by the elevator, the door being broken down, assumes the risk of the negligence of fellow servants who knew of the method and knew their own duties with respect to it.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 2.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

5. Master and Servant (§ 265 (2)*)—Discharge of Duty Presumed.—The master is presumed to have discharged all unassignable duties.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 669.]

6.—Master and Servant (§ 288 (1)*)—Assumption of Risk Jury Question.—The doctrine of assumed risk is a harsh one, and not to be extended, and in doubtful cases the question of its applicability is for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

7. Master and Servant (§ 296 (4)*)—Instruction on Right to Assume Master's Performance of Unassignable Duties Held Misleading in View of Other Instructions.—An instruction that the law does not require a servant to anticipate and guard against the master's negligence, but the servant may assume the master has performed his unassignable duties, is correct in the abstract, but misleading in view of an instruction that it was the master's unassignable duty to keep the elevator in proper position, the servant having fallen down the shaft because of its being misplaced, the duty of placing the elevator being an assignable one.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 717.]

8. Appeal and Error (§ 1177 (7)*)—New Trial (§ 164*)—Failure of Losing Defendant to Ask for Final Judgment in Lower Court or Petition for Writ of Error Would Not Prevent Such Being Given under the Code.—Failure of the defendant to ask judgment entered in its favor under Code 1919, § 6251, in the lower court and to ask final judgment in the petition for writ of error pursuant to section 6365, would not estop the losing defendant from obtaining, or prevent the trial court or appellate court from entering, the final order under these sections, in a proper case, and where thoroughly convinced of error in instructions another jury trial will be ordered.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 436.]

9. Negligence (§ 136 (26)*)—Contributory Negligence for Jury.—Where contributory negligence is not carried by the evidence beyond the realm within which reasonable men might fairly differ, the question is one for the jury.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 415, 416.]

10. Master and Servant (§ 289 (25)*)—Contributory Negligence in Passing Elevator Question for Jury.—Although a moment before plaintiff servant fell into the elevator shaft he had fixed its location by his sense of touch, where his errand took him elsewhere, and he did not intend to step into the elevator, even if it was flush with the floor as it was usually left, he cannot be said to be guilty of con-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

tributory negligence as a matter of law in risking his judgment as to its position in passing it the second time.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 419.]

11. Master and Servant (§ 203 (1)*)—Contributory Negligence and Assumed Risk Distinct Defenses.—Contributory negligence and assumed risk are separate and distinct defences, and the servant may be free from negligence and barred from damages because of an assumption of risk though the accident was due to an unsafe place or an unsafe appliance.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 692.]

12. Master and Servant (§ 288 (2)*)—Assumption of Risk Question for Jury.—In a servant's action for injuries by falling down an unguarded elevator shaft, the question whether he assumed the risk of coemployee's failing to leave the elevator flush with the floor, the elevator door having been broken, was an issue properly regarded as within the province of the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 700.]

Appeal from Circuit Court of City of Lynchburg.

Action by J. F. Alvis against Morris & Co., for personal injuries. Verdict and judgment for plaintiff, and the defendant appeals. Reversed, and remanded for new trial.

Volney E. Howard and *Jno. L. Lee,* both of Lynchburg, for appellant.

Harrison & Long, of Lynchburg, for appellee.

DAVIS *v.* HEFLIN.

June 16, 1921.

[107 S. E. 673.]

1. Libel and Slander (§ 75*)—Words Actionable at Common Law May Be Sued on in Any Jurisdiction Where Defendant Found.—Words actionable at common law may be sued on in a common law action in any jurisdiction where defendant may be found.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 295.]

2. Evidence (§ 80 (1)*)—Where Words Defamatory under Statute Were Published in Another State, Plaintiff Must Prove Existence of Similar Statute in Such State.—Where an action for defamation arises upon a statute, and the words were spoken or published in a state other than that in which the action was brought, plaintiff must prove as a fact that a like statute was in force in such other state.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 786.]

3. Libel and Slander (§ 24*)—Direct Personal Defamation without

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.